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No. 98-708

IN THE
Supreme Court of the United States

October Term, 1998

In Re SCOTT E. STAFNE

On Petition for Writ of Mandamus To the United States Court of Appeal for the Ninth Circuit

MOTION BY THE "CENTER FOR JUDICIAL ACCOUNTABILITY" FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF STAFNE'S PETITION FOR A WRIT OF MANDAMUS AND THE AMICUS CURIAE BRIEF BY THE "CENTER FOR JUDICAL ACCOUNTABILITY" IN SUPPORT OF STAFNE'S PETITION FOR WRIT OF MANDAMUS

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35 pp

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The McTurnals have refused consent for Center for Judicial Accountability (Center) to file an amicus curiae brief. Accordingly, the Center hereby moves for leave to file an Amicus Curiae brief.

The Center is an organization of laymen, attorneys, and professors. Its purpose is to investigate and publicize likely abuses of judicial power. The Center's definition of "abuse of judicial power" includes, but is not limited to: instances indicating the judiciary has acted ultra vires and/or without subject matter jurisdiction; instances where objective evidence indicates a court is discriminating against litigants because they have appeared pro se or are being represented by a small firm against a client who has been able afford to hire a large firm; instances in which a court has acted in such an arbitrary and capricious manner as to offend fundamental notions of due process and to demean the integrity of the judiciary.

The instant mandamus action falls within the Center's definition of a likely "abuse of judicial power" because Stafne has alleged and presented evidence that the Ninth Circuit has implemented a system prohibiting oral argument which is inconsistent with FRAP 34(a). *See* Stafne's Petition for Writ of Mandamus (Petition), Appendices A – G, A1 – A86. In addition, Stafne has alleged, based on conversations with Ninth Circuit staff personnel (*see* Petition, A68 – 69, A72 –A73), that this system was designed to and does impair the rights of pro se litigants to oral argument under FRAP 34(a). FRAP 34(a) provides:

> ***Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and***

> ***records, shall be unanimously of the opinion that oral argument is not needed.*** Any such local rule shall provide any party with an opportunity to file a statement why oral argument shall be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall confirm substantially to the following minimum standard:
>
> ***Oral argument shall be allowed unless***
> ***(1)the appeal is frivolous; or***
> ***(2) the dispositive issue or set of issues has been recently authoritatively decided; or***
> (3) ***the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.*** [Emphasis supplied]

Stafne's unrebutted allegations include A.) That the Ninth Circuit has created an undisclosed system of procedures intended to discriminate against an entire class of litigants in violation of law; and B.) That in devising and implementing this system, the Ninth Circuit violated Article III, the First Amendment and the Fifth Amendment of the United States Constitution.

The Court of Appeals for the Ninth Circuit has rebuffed all requests for factual information regarding its alleged abuse of judicial power. For example, in an April 3, 1998[1] letter to Chief Judge Hug, Stafne sets forth the

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[1] Stafne's April 3, 1998 letter to Judge Hug is set forth at pages A70 – A74 of his Petition. The letter in the Appendix is dated October 4, 1998. This is an error. *See* Declaration of Scott E. Stafne, included as an Appendix hereto.

criteria a Ninth Circuit staff attorney said were used in making oral argument screening recommendations. Petition A71 – A73. Based on this information, Stafne respectfully requested the Court provide an "on the record answer" to whether any factors "other than those enunciated in FRAP 34(a)" were utilized in the Court's initial screening process pursuant to General Order 6.5(a). Petition, p. A73 – A74.

In response, Chief Judge Hug wrote, "***there is no right to oral argument in any appeal***" and appeared to admit the existence of undisclosed criteria. *See* Appendix hereto, A1-A6. Nonetheless, Judge Hug asserted that Stafne had received all "relevant information" regarding the procedures and criteria applied by staff in "making the initial argument/non-argument calendar recommendations". *See* Appendix hereto, A5.

The Chief Judge's statements that "there is no right to oral argument in any appeal" is directly contradicted by FRAP 34(a) which states: "Oral argument shall be allowed [in all appeals]" unless the criteria of the rule are met. Judge Hug's refusal to disclose the criteria involved in the Ninth Circuit's oral argument screening process clearly violated the mandate of FRAP 34(a) that "[a] general statement of the criteria employed in the administration of such local rule [adopted pursuant to FRAP 34(a)] shall be published in or with the rule …."

More recently, the Center wrote the Court of Appeals requesting information about its procedures related to oral argument. *See* Declaration of Geoffrey Anderson-Estep, Appendix hereto A7-A12. To date (almost four weeks later) there has been no response. *Id.*

ARGUMENT

Stafne's Petition primarily focuses on how the Court of Appeals' procedures violate the personal and structural interests protected by Article III of the United States Constitution. The Center believes that the failure of a court to meaningfully review challenges to its own authority implicates a plethora of other Constitutional provisions necessary to preserving the legitimate role of the judiciary in our tripartite system of government.

Stafne's motion requested the Ninth Circuit Court of Appeals to **judicially review** its General Orders and procedures relating to oral argument against the backdrop of the United States Constitution and FRAP 34(a). As Chief Justice Marshall stated in *Marbury v. Madison*, 1 Cranch 137, 177-178 (1803):

> "It is emphatically province and duty of the judicial department ***to say what the law is***. Those who apply the rule to particular cases, ***must of necessity expound and interpret that rule.*** If two laws conflict with each other, the courts must decide the operation of each." [Emphasis supplied]

The Ninth Circuit's bald denial of Stafne's motion utilizes its power of judicial review to protect itself against challenges to its authority without undertaking its concomitant responsibility to "say" what the law is and to "expound" and "interpret" the law. This is an improper utilization of judicial review and undermines its legitimate purposes.

Although Stafne's brief indicates why Article III requires an inferior court articulate the reasons for its decisions, the "structural interests" at stake are much more profound. As the Center's Amicus Curiae brief

points out the Constitution mandates reasoned decision making by the courts so that all centers of power in our government (the executive branch, the legislative branch, the judicial branch, the states, and the people) have the opportunity to meaningfully review the court's decisions.

Moreover, Stafne's brief does not adequately deal with the "separation of powers" issues implicated by a court's unreasoned decision-making. Indeed, as is pointed out in the Center's brief this case is very similar to *Youngstown Sheet and Tube Company v Sawyer*, 343 U.S. 579 (1952) except that it is the judicial branch attempting to usurp legislative power.

The Center strongly believes the judicial branch of government can only retain its legitimacy if the public and other centers of power in our system of government believe that courts act in reasoned, impartial, and open manner. The bald decision of the Ninth Circuit Court of Appeal's upholding its own authority does not foster an impression of fairness and openness and thus demeans the integrity of the courts.

For all the reasons stated above, the Center respectfully moves this Court for leave to file the following amicus curiae brief.

Respectfully submitted,

s/ Daniel R. Whitmore

s/ Mark Douglas Kimball
Attorneys for the
Center of Judicial Accountability

APPENDIX TO MOTION
A1
DECLARATION OF SCOTT E. STAFNE IN SUPPORT OF THE "CENTER FOR JUDICAIL ACCOUNTALITY" MOTION FOR LEAVE TO FILE AN AMICUS CURIAE IN SUPPORT OF STAFNE'S PETITION FOR WRIT OF MANDAMUS

My name is Scott E. Stafne. I make this declaration upon the basis of personal knowledge.

I affirm that Exhibit 1 hereto is a true and correct replication of the letter I received from Chief Judge Procter Hug on or about May 6, 1998 responding to my April 3, 1998 letter to him. My letter April 3, 1998 letter to Judge Hug is reproduced at pages A70 – A74 of the Appendix to my Petition for Writ of Mandamus. Unfortunately, it is misdated in the Appendix as being sent October 4, 1998. I believe the reason for this mistake is that my computer automatically updates the date on letters to the current date when I retrieve a letter and do more work on it. In this case I retrieved the letter in order to reproduce it in this Court's required format.

A similar problem occurred with my January 30, 1998 letter to Judge Hug, which is set forth at pages A33 – A34 of the Appendix to my Petition for Writ of Mandamus. Once again the computer updated the date when I retrieved the letter to put it in the required format. Molly Dwyer's February 5, 1998 letter responding to it provides proof that the letter in question was written on January 30, 1998. Ms. Dwyer's letter is set forth at page A37 – 39 of the Appendix to my Petition for Writ of Mandamus. Ms. Dwyer's letter

states in pertinent part: "I write in response to your letter dated January 30, 1998. *Id.* at A37

I declare under the penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Dated: November 23, 1998

s/ Scott E. Stafne

Exhibit 1

UNITED STATES COURTS
FOR THE NINTH CIRCUIT
BRUCE R. THOMPSON U.S. COURTHOUSE &
FEDERAL BLDG.
400 S. VIRGINIA STREET, STE 708
RENO, NEVADA 89501

Chambers of
PROCTER HUG, JR.
Chief Judge

PH:(702) 686-5949
FX:(702) 686-5958

May 6,1998

Mr. Scott Stafne, Esq.
801 Pine Street
Suite 6C
Seattle, Washington 98101

Dear Mr. Stafne:

I write in response to your letter dated April 3, 1998, in which you request additional information concerning the way in which cases are initially set on an argument or non-argument calendar.

As you have previously heard, at the completion of briefing, all appeals are reviewed for case management purposes by a group of experienced staff

attorneys who make an initial recommendation about whether, pursuant to Circuit Rule 34-4, oral argument would assist in the decisional process or, whether the case should be calendared before a non-argument, conference panel. If the attorney concludes that a case falls within the scope of Circuit Rule 34-4, the parties will be so notified, and given an opportunity to object. Any objections received will be forwarded to the panel of three judges assigned to consider the merits of the appeal. In considering the merits of such appeals as part of our non-argument conference calendars, the panel will of course consider the briefs and record, and if any one of the three judges determines that oral argument would significantly aid the decisional process, the panel will order that the case be reassigned to one of our upcoming argument calendars. If, on the other hand, the panel unanimously concludes that oral argument would not significantly aid the decisional process, they will, in its written decision on the merits, inform the parties of their ruling on the issue.

Regardless of the preliminary staff case management assessment, pursuant to Fed. R. App. P. 34, Ninth Circuit R. 34-4, and General Orders 6.5, any decision not to allow oral argument must be a unanimous one made by the three judge panel assigned to consider the merits of an appeal. This explains why some cases initially slated for submission on the briefs before a non-argument conference panel may wind up being orally argued (including some pro se cases), and some cases initially slated for argument may wind up being submitted on the briefs (including many counseled

cases). Your case, for example, has been removed from the non-argument conference calendar and has been forwarded to one of our argument calendars. This, however, does not necessarily mean that the Case will be orally argued. Again, that is a decision to be made by the three judges on the argument calendar assigned to consider the merits of your appeal. ***The fact of the matter is that there is no right to oral argument in any appeal***, pro se or counseled, but a decision not to hold oral argument on a case requires the unanimous agreement of the panel that will decide the merits of the appeal.

I wish to emphasize that the briefs and the record in a case provide the primary basis for a decision on appeal. Oral argument can be a help to explain the arguments made in the briefs. Oral argument is not designed to bring new arguments, and it is improper for a party to do so. Thus, when a panel decides not to have oral argument, it is because the result is clear from the briefs and the record.

You have received all relevant information regarding the procedures and criteria applied by staff in making the initial argument/non-argument calendar recommendations. Your case is, in fact, an example of the process at work, and demonstrates that the initial staff case processing recommendation is merely a recommendation, and that all appeals, whether counseled or pro se are ultimately subject to a unanimous decision by a three judge panel about whether oral argw-nent will be heard. Oral argument

will be heard if any one of the judges believes it will be helpful to the decisional process.

Yours sincerely,

s/Procter Hug jr.

CHIEF JUDGE

PH:tls

[Emphasis supplied]

DECLARATION OF GEOFFRY ANDERSON-ESTEP IN SUPPORT OF THE "CENTER FOR JUDICAIL ACCOUNTALITY" MOTION FOR LEAVE TO FILE AN AMICUS CURIAE IN SUPPORT OF STAFNE'S PETITION FOR WRIT OF MANDAMUS

My name is Geoffrey Anderson-Estep. I make this declaration upon the basis of personal knowledge. I affirm that Exhibit 2 hereto is a true and correct replication of the letter the "Center for Judicial Accountability" sent out to Judge Hug on or about October 27, 1998. To date there has been no reply.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Dated: November 23, 1998

s/ Geoffrey Anderson-Estep

EXHIBIT 2 – PAGE 1

CENTER FOR JUDICIAL ACCOUNTABILITY

1122 East Pike
Street, Suite 1180
Seattle,
Washington 98122

October 24, 1998

The Honorable Judge Proctor Hug, jr.
Chief Judge, United State Court of Appeals
for the Ninth Circuit
Bruce R. Thompson U.S. Courthouse & Federal Building
400 S. Virginia Street, Suite 708
Reno, Nevada, 89501

Dear Judge Hug:

The Center for Judicial Accountability is a recently formed organization of laymen and attorneys. Its purpose is to investigate and publicize likely abuses of judicial power. Included within the Center's definition of "abuse of judicial power" are cases in which litigants are discriminated against by a Court because the litigant is appearing pro se or being represented by a small firm against a client who has been able afford to hire a large firm.

The Center has recently considered the pleadings filed with the United States Court of Appeals Ninth Circuit in Stafne v. McTurnal, No 97-35163, the correspondence between the Court of Appeals and Mr. Stafne, and Mr.

Stafne's Petition for Mandamus against the Court of Appeals for the Ninth Circuit filed in United States Supreme Court. While several of the issues raised in these materials are of considerable interest to Center members[1], this letter seeks information only with regard to whether the Ninth Circuit is or has been utilizing procedures not set forth in FRAP 34(a) or Ninth Cir. R. 34-4 to disallow litigants' their statutory and potentially constitutional rights to oral argument.

Our investigation of this issue centers around two primary concerns. The first is that the materials in the record indicate the Ninth Circuit has a presumption against allowing pro se litigants oral argument. The second is you, as Chief Judge, appear to acknowledge in your May 6, 1998 letter to Mr. Stafne that the Court employs procedural criteria that are not available to litigants or the public. The purpose of this letter is to request information about these concerns.

DOES THE COURT OF APPEALS DISCRIMINATE AGAINST PRO SE LITIGANT'S WITH REGARD TO ORAL ARGUMENENT?

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[1] For example, Stafne alleged that attorneys from a large law firm had made numerous material factual misrepresentations in their briefs. Stafne provided evidence that on its face illustrated the factual misrepresentations. But a panel of this Court refused to even consider Stafne's request for sanctions because it "was derivative of his substantive claims, and therefore were properly dismissed therewith". The panel cited no authority in support of this holding which is directly contrary to controlling Supreme Court precedent. Similarly, the Center is concerned about another panel's refusal to meaningful address Stafne's assertions that this Court acted beyond its legal and Constitutional authority in implementing General Orders and procedures alleged to be facially consistent with FRAP 34(a). However, as both of those issues are currently under judicial consideration, the Center chose to focus the purpose of this letter on obtaining information which it believes should be open to the public.

Historically, this court employed a presumption against allowing pro se litigants oral argument. See *In re Amendment of Rule 3*, 440 F. 2d 847 (9th Cir. 1970). Mr. Stafne's declaration under oath indicates several staff members told him the most likely reason his case had been assigned to a written screening calendar was because he had filed his pleadings "pro se". Given this history, the Center respectfully asks this Court whether its employees utilize the fact that a pleading has been filed pro se in making any determination, preliminary or otherwise, in assigning cases to screening calendars. The Center also requests the Court provide information as to: 1.) The number of pro se cases filed with the Court of Appeals in the last five years; and 2.) The number or percentage of those pro se filed cases where this Court sent out its initial oral argument screening letter indicating that the Court was considering submission of their case without oral argument. If this information is not readily available, the Center would be willing to pay for a statistician to work with the Court of Appeals in acquiring such information.

DO COURT STAFF UTILIZE UNDISCLOSED WEIGHING FACTORS PURSUANT TO GENRAL ORDER 6.5(a) IN ASSIGNING CASES TO SCREENING CALENDARS? IF SO, WILL THE COURT DISCLOSE THOSE FACTORS? IF NOT, WHY?

After being placed on the written screening calendar and his discussions with court personnel suggesting that factors other than those enunciated in Ninth Cir. R. 34 were being utilized to make oral argument screening

decisions, Mr. Stafne wrote you a letter on April 3, 1998 which stated in pertinent part:

> "What I respectfully request as a member of the bar of this circuit from you, as Chief Judge, is an on the record ancer to whether any factors other than those enunciated FRAP 34(a) and Ninth Cir. R. 34-4 are utilized in this court's initial screening pursuant to General Order 6.5(a)."

Your response to this specific question appears to be that because Mr. Stafne's case was reassigned to an argument calendar he had "received to all relevant information regarding the procedures and criteria applied by staff in making the initial/non-argument calendar recommendations". This answer implies there are other criteria (specifically those referred to in General Order 6.5(a)) which the court was unwilling to make available to Stafne because it deemed such criteria " not relevant".

The Center is investigating this Court for potential abuses of power. FRAP 34(a) states explicitly that: "A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to" the minimum criteria set forth in FRAP 34(a). General Order 6.5(a) requires cases before this Court be placed on screening calendars based on a clerk's numerical weighing of undisclosed factors. The fact that Court staff employees have acknowledged factors, such as pro se status, may affect whether a case is placed on an oral is screening calendar raises legitimate concern over just

what those factors are. Accordingly, the Center respectfully requests this Court provide a copy of any written documents related to the numerical weighing process referred to in General Order
Page 3

6.5(a). If the Court chooses a not to disclose such documents, the Center requests the Court provide a meaningful explanation, containing relevant authority, which gives this Court authority to process cases pursuant to procedures which are not disclosed litigants or the public.

Thanking you for your prompt reply to these matters, the members of the Center are

Very truly yours,

s/Geoffrey Anderson-Estep
Acting Director

s/Robert Rosellini

s/Carole Palmer

s/Ronald Margolis

s/Peter P. Strand

s/Paul Hernandez

s/Larry Stauffer

No. 98-708

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AMICUS CURIAE BRIEF BY THE "CENTER FOR JUDICAL ACCOUNTABILITY" IN SUPPORT OF STAFNE'S PETITION FOR WRIT OF MANDAMUS

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THE INTEREST OF THE CENTER FOR JUDICIAL RESPONSIBILITY IN STAFNE'S PETITION FOR WRIT OF MANDAMUS TO THE NINTH CIRCUIT COURT OF APPEALS

The Center for Judicial Accountability is an organization of laymen, attorneys, and professors[1]. Its purpose is to investigate and publicize likely abuses of judicial power. The Center's definition of "abuse of judicial power" includes, but is not limited to: instances indicating the judiciary has acted ultra vires and/or without subject matter jurisdiction; instances where objective evidence indicates a court is discriminating against litigants because they have appeared pro se or are being represented by a small firm against a client who has been able afford to hire a large firm; instances in which a court has acted in such an arbitrary and capricious manner as to offend fundamental notions of due process and to demean the integrity of the judiciary.

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeal's refusal to provide a reviewable response to Stafne's objections and motions challenging the Ninth Circuit's Constitutional and legal authority to establish policies and procedures alleged to violate FRAP 34(a). Article III, the First Amendment, and the Fifth Amendment constitutes an abuse of judicial power that offends virtually all of the structural elements of the

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[1] The legal services in preparing this brief were donated by counsel. Center members paid for printing costs. No counsel for any party contributed to the writing of this brief.

Constitution designed to prevent any one branch of government from taking power from the others. Accordingly, this Court should issue a writ of mandamus requiring the Court of Appeals to issue a decision setting forth its reasons for rejecting Stafne's motion and objections.

ARGUMENT

Stafne's argument that the Court of Appeals failure to provide a reviewable decision violates the "structural elements" of the Constitution merits more consideration than the three pages of argument contained in his Petition for Writ of Mandamus (Petition) at pages 11 – 13.

The structural elements of the Constitution were created by our forefathers to preserve the peoples' liberty and protect the people against tyranny. *See e.g. United States v Brown*, 381 U.S. 437, 442-43 (1965); *Buckley v. Valeo*, 424 U.S. 122. See also *INS v. Chadha*, 462 U.S. 919, 951 (1983). In *Brown* , Chief Justice Warren noted:

> The Constitution divides the National Government into three branches -- Legislative, Executive and Judicial. This "separation of powers" was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny. For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application,

and executive implementation, no man or group of men will be able to impose its unchecked will. James Madison wrote:

> "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

Brown, 381 U.S. at 442-43.

The structural elements in the Constitution designed to preserve liberty and protect against tyranny include, but are not limited to: the separation of powers between the three branches of the federal government; checks and balances to insure that one branch does not overstep its Constitutional authority; judicial review; and federalism. In this case, the Ninth Circuit's refusal to provide reasons or authority for its decision violates virtually all of the Constitution's structural elements.

SEPARATION OF POWERS

In *Youngstown Sheet and Tube Co. v Sawyer,* 343 U.S. 579, 587 (1952), this Court found the President's seizure of steel mills amounted to unconstitutional lawmaking where Congress had provided for other modes of seizure. This case is virtually identical to *Youngstown* except for the fact the offending branch of government is the judiciary, not the executive.

In *Youngstown,* the Court noted Congress had passed laws regarding the seizure of property, but the

executive had elected not to follow them. The Court therefore found that the President had engaged in *unconstitutional* lawmaking when he issued his own executive order seizing steel mills. *Id.* at 586, 588. Here, it is claimed the Ninth Circuit implemented General Orders and procedures inconsistent with FRAP 34(a), a rule which has the force and effect of a federal statute. *Sibbach v Wilson & Co., Inc.*, 312 U.S. 1, 13 (1940). Thus, the Ninth Circuit's implementation of orders inconsistent with FRAP 34(a) amounts to a similar, unconstitutional attempt by the judiciary to seize legislative authority.

CHECKS AND BALANCES

Stafne correctly asserts that the Ninth Circuit's refusal to meaningfully address his constitutional challenges to the Ninth Circuit's General Orders and practices disturbs the structural design of the Constitution because this Court cannot review the inferior court's decision making process pursuant to Article III. *See* Petition pages 11 – 13.

But, that is just the tip of the iceberg. By refusing to provide any reasoned response to Stafne's challenges to its authority, the Court of Appeals also effectively preempts the other branches of the federal government, the states and the people from evaluating and determining whether the Court has taken legislative power for itself. This is important, as each branch of government and the states and the people are supposed to serve as a check on one another. *Gregory v Ashcroft*, 501 U. S. 452, 458 (1991). In *Gregory* this court stated:

> Perhaps the principal benefit of the federalist system is a check on abuses of government

power. "The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985), quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting). Just as the separation and independence of the coordinate Branches of the Federal Government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. Alexander Hamilton explained to the people of New York, perhaps optimistically, that the new federalist system would suppress completely "the attempts of the government to establish a tyranny."

James Madison made much the same point:

> In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct

> governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."

The Federalist No. 51, p. 323 (J. Madison).

The Ninth Circuit's refusal to provide a substantive written response to Stafne's challenges to its authority frustrates the ability of the other federal branches, the states and the people to be a check on the court's power[2]. For just as this Court cannot meaningfully review the Ninth Circuit's bald denial of Stafne's motions, neither can the legislature, the executive, the states or the people. This prevents our Constitutional system of checks and balances from working as the Constitution intended.

Moreover, the First Amendment arguments Stafne made in asking the Ninth Circuit to disclose the weighing process it uses in assigning cases to screening calendars also apply to the court's failure to provide a meaningful response to Stafne's Constitutional challenges. As Stafne states at pages A57 – 59 of Appendix E:

> Our justice system has always recognized a common law rule that civil and criminal

[2] The Tenth Amendment contemplates that "the States and or the people" can be a check on the usurpation of power by the federal government or any of its three branches.

judicial proceedings are presumptively open. *Gannet Co, Inc. v. Depesqucale,* 443 U.S. 368, 384 - 387, 99. S. Ct. 2898, 61 L. Ed. 2d 608 (1978). The Supreme Court has held that in certain situations this common law right has a constitutional basis. For example, in *Richmond Newspapers v. Virginia,* 448 U.S. 555, 100 S. Ct. 2398, 61 L.Ed. 2d 973 (1980) the Court held First Amendment freedoms of speech, press, and assembly share a common core purpose of insuring freedom of communication on matters relating to the functioning of government, including the operations of the judiciary. Although the *Richmond* holding dealt with a criminal trial, footnote 17 indicates the First Amendment right to open proceedings also applies to civil proceedings[3]. The reasons the Supreme Court has given for finding a First Amendment right to open judicial proceedings include "assurance that the proceedings were conducted fairly to all concerned"[4]; to "discourage ... decisions based on bias or partiality"[5]; so that "spectators learn about their government and acquire confidence in the judicial system"[6]; because "open proceedings enhanced the performance of all involved, protected the

---

[3] Justices Brennan and Marshall squarely indicated in Brennan's concurring opinion that they believed there was a right to open civil proceedings. *Id.* at 599.

[4] *Id.* at 568.

[5] *Id.*

[6] *In re Oliver,* 333 U.S. 257, 271 (1947).

judge from imputations of dishonesty, and served to educate the public".[7] The Court has emphasized that "[t]he crucial prophylactic agents of the administration of justice cannot function in the dark, no community catharsis can occur if justice is done in a corner [or] any covert manner" [8]

Stafne respectfully contends the First Amendment also mandates open and public decision making by appellate tribunals with regard to legal determinations involving constitutional, statutory, or procedural rights. This First Amendment right is violated in this case by this court's ... [failure to provide a reasoned response to Stafne's Constitutional challenges to its general orders and procedures].

The role that public and open judicial proceedings play in assuring fairness to litigants is also significant with regard to due process guarantees. For as the Supreme Court stated in *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 64 L. Ed. 2d 182, 100 S. Ct. 1610 (1980) "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases". *Id.* at 242. Among the concerns protected by this rule, the Court noted, is the preservation of both the appearance and reality of fairness, "generating the feeling, so

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[7] *Richmond Newspapers,* 448 U.S. at 568.

[8] *Id.* at 571 (Brennan, J. Concurring).

> important to a popular government that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with the assurance that the arbiter is not predisposed to find against him." (quoting *Joint Anti-Fascist Comm. v. McGrath,* 341 U.S. 123, 172, 95 L. Ed. 2d, 71 S. Ct. 624 (1951).

In summary, the Ninth Circuit's failure to provide a meaningful response to Stafne's challenges to its General Orders and practices prevents any person or entity from reviewing its decision. Neither this Court, nor Congress, nor the executive, nor the states, nor the people can review a decision that has not been explained or supported by authority. Accordingly, the Ninth Circuit's naked assertion of judicial power without resort to reasoning or authority is an inappropriate usurpation of power more consistent with the caprice of a third world despot than a court operating in a free and open democracy.

JUDICIAL REVIEW

Stafne challenged the Court of Appeals' General Orders and procedures as being inconsistent with FRAP 34(a). As previously noted, a duly enacted rule of procedure, like FRAP 34(a), has the same force as a federal statute. *Sibbach v Wilson & Co, Inc,.* 312 U.S. 1, 12 (1940). Stafne also challenged the General Orders as being inconsistent with Article III, the First Amendment and the Fifth Amendment to the United States Constitution. Thus, Stafne was clearly asking the Court of Appeals to "judicially review" its own General

Orders and procedures to determine whether they were contrary to the Constitution and FRAP 34(a). *See* Appendix C, at A7[9]

The Court's decision does not give any indication of whether it actually meaningfully considered Stafne's Constitutional challenges to its authority or just decided that it could preempt the issue by denying the motion and telling Stafne not to raise it again. The power of judicial review gives the judiciary the responsibility to set forth its reasoning so that all (*i.e.* the three branches of the federal government, the states, and the people) can understand what the law is. *Marbury v. Madison*, 1 Cranch 137, 177-178 (1803).

In *Mackey v United States*, 401 U.S. 667, 678 (1971)(Harlan concurring), Mr. Justice Harlan spoke about the "awesome power of judicial review". He stated:

> But we possess this awesome power of judicial review, this duty to bind coordinate branches of the federal system with our view of what the Constitution dictates, only because we are a court of law, an appellate court charged with the responsibility of adjudicating cases or controversies according to the law of the land and because

[9] In support of his motion, Stafne cited *Mississippi Publishing Corp. v. Murphree*, 362 U.S. 438, 444 (1946) (the fact that the Supreme Court promulgated the Federal Rules of Civil Procedure "does not foreclose consideration of their validity, meaning, or consistency"); *N.L.R.B. v. Intern. Assoc. of Heat and Frost Insulators and Asbestos Workers*, 476 F. 2d 275 (3d. Cir. 1973) (considering challenge to local rule as inconsistent with Federal Rules of Appellate Procedure).

the law applicable to any such dispute necessarily includes the Federal Constitution. That is the classic explanation for the basis of judicial review, an explanation first put forth by Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch 137, 177-178 (1803), and from that day to this the sole continuing rationale for the exercise of this judicial power:

> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation . . . .
>
> ***It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.*** [emphasis added] If two laws conflict with each other, the courts must decide on the operation of each.
>
> If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Simply denying Stafne's challenge to its authority is not "**saying what the law is**" and therefore is not appropriate judicial review. Moreover, under *Marbury v Madison,* those who perform judicial review must not only "say what the law is", they "must **expound and interpret** that rule [of law before the court]".

In this case, the Ninth Circuit failed to do what courts have been expected to do since Chief Justice Marshall wrote *Marbury v. Madison* nearly 200 years ago. The Ninth Circuit failed to "say what the law is," and this Court should order the Ninth Circuit to do so.

CONCLUSION

For the reasons stated above, this Court should grant Stafne's Petition for Mandamus and require the Court of Appeals for the Ninth Circuit to provide a reviewable decision in response to his objections and motions.

Respectfully submitted,

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